STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of Z.B.J, Minor.

UNPUBLISHED
May 13, 2014

No. 317332
Livingston Circuit Court
Family Division
LC No. 2012-014135-NA

Before: FITZGERALD, P.J., and SAAD and WHITBECK, JJ.

PER CURIAM.

Respondent mother appeals as of right the order terminating he parental rights to the minor child pursuant to MCL 712A.19b(3)(b)(ii), (3)(g), and (3)(j). We affirm.

Respondent first argues that the trial court clearly erred by finding that statutory grounds existed for termination of her parental rights. To terminate parental rights, a trial court must find by clear and convincing evidence that at least one statutory ground under MCL 712A.19b(3) has been established. *In re Trejo Minors*, 462 Mich 341, 355; 612 NW2d 407 (2000). This Court reviews for clear error a trial court's finding of whether a statutory ground for termination has been proven by clear and convincing evidence. MCR 3.977(K); *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *Id*. at 296-297.

The trial court terminated respondent's rights under MCL 712A.19b(3)(b)(ii), (g), and (j), which provide as follows:

> The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
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> (b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:
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> * * *
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> (2) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

* * *

> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

* * *

> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

With regard to MCL 712A.19b(3)(b)(ii), respondent argues, citing MCR 3.977(F), that this statutory ground was contained within the original petition and that only new allegations of physical abuse should have been contained in the supplemental petition. She contends that the allegations of physical abuse that were contained within the original petition should have been stricken from the supplemental petition and that "only new or different allegations should have been alleged and the statutory basis should have been found under those new or different circumstances. Therefore, statutory grounds cannot be found under MCL 712A.19b(3)(b)(ii) because it was not a new or different circumstances."[1]

Under MCR 3.977(F), where the supplemental petition seeking termination alleges one or more "new or different" circumstances than those that led the court to take jurisdiction of a child, the new circumstances must be proven by clear or convincing legally admissible evidence. Respondent's argument that MCR 3.977(F) allows the court to *only* consider new allegations when determining whether a statutory basis has been established is misplaced. Respondent does not challenge the trial court's finding that clear and convincing evidence established that the child suffered from physical abuse and would suffer from further abuse if she was returned to respondent. "Only one statutory ground need be established by clear and convincing evidence to terminate a respondent's parental rights, even if the court erroneously found sufficient evidence under other statutory grounds." *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). Nonetheless, the record shows that respondent was aware of the legal father's treatment of the child and, although expressing disapproval, did nothing to protect the child from the father's harm. Further, numerous experts testified that respondent's failure to benefit from services and lack of improvement in her parenting skills indicated that respondent would be unable to properly care for the child and protect her from harm.[2] The trial court's finding that termination

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[1] Respondent contends that paragraphs A – R of the supplemental petition should have been stricken.

[2] Because respondent does not challenge the trial court's finding under MCL 712A.19b(3)(b)(ii) that clear and convincing evidence established that the child suffered from physical abuse and would suffer from further abuse if she was returned to respondent, and because we have concluded that at least one statutory ground for termination existed, we are not obligated to

of respondent's parental rights was proper pursuant to MCL 712A.19b(3)(b)(ii) does not leave us with a definite and firm conviction that a mistake has been made. *In re BZ*, 264 Mich App at 296-297.

With regard to MCL 712A.19b(3)(g), respondent argues that there was "no clear and convincing evidence Mother would not be able to provide proper care and custody." However, the record contains abundant evidence that there is no reasonable expectation that respondent will be able to provide proper care and custody within a reasonable time considering the child's age. Prior to the Department of Human Services' (DHS) involvement in this case, respondent participated in a parenting class but was unable to recall anything that she had learned during that class. After the parties agreed in the present case to change the permanency goal from adoption to reunification and provide respondent with services, respondent was provided with numerous sessions with a one-on-one parenting coach. All of the witnesses, with the exception of respondent's expert, testified that respondent was unable to show significant progress such that the child could be safely and properly cared for even during a supervised visit. Although respondent complied with the parent-agency agreement, she failed to benefit from the services. Mere compliance with services, without benefitting from those services, is insufficient to avoid termination of parental rights. *In re Gazella*, 264 Mich App 668, 676; 692 NW2d 708 (2005), superseded in part on other grounds by statute as stated in *In re Hansen*, 285 Mich App 158, 163; 774 NW2d 698 (2009), vacated in part on other grounds 486 Mich 1037 (2010). There is no clear error in the court's finding that "Given Mother's lack of consistent improvement and failure to benefit from previous services, there seems little expectation that her parenting skills would improve to the point that she could properly care for this child, or protect the child from harm, within a reasonable time considering the child's age."

With regard to MCL 712A.19b(3)(j), mother offers little argument, other than to rely on her argument with regard to subsection (3)(g). She does not address the court's findings but, rather, contends that she should have been provided with "hands on coaching/training on how to be a proper parent." She contends that she was "making progress" and had a capacity to learn. She concludes that "the record was replete of evidence to substantiate clear and convincing evidence to terminate under MCL 712A.19b(j)."

Contrary to respondent's brief argument, the record shows that there is a reasonable likelihood, based on the conduct or capacity of respondent, that the child would be harmed if returned to respondent's home. Respondent does not dispute that she "was having difficulty learning how to properly care for" the child. Respondent was provided with one-on-with parent coaching and education and the coaching was tailored to a format that would suit respondent's learning style and cognitive limitations. Despite this service, abundant testimony was presented that respondent was unable to retain what she learned and demonstrate the skills taught, and was unable to progress to a point that she could properly and safely care for the child even during supervised parenting time.

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determine whether MCL 712A.19b(3)(g) and (j) were established by clear and convincing evidence. However, we will briefly address these issues.

Respondent also argues that DHS was biased against her and that it impacted the services provided. Other than her own criticism of the actions of DHS and the team of workers contracted to assess and assist respondent, she offers no evidence to suggest bias. She also argues that DHS failed to make reasonable efforts to reunify respondent with her child in violation of the Americans with Disabilities Act, 42 USC 12101 *et seq*. "In general, when a child is removed from the parents' custody, the petitioner is required to make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan." *In re Fried*, 266 Mich App. 535, 542; 702 NW2d 192 (2005), citing MCL 712A.18f(1), (2), and (4). Respondent contends that DHS did not adequately accommodate her mental deficiencies and provide adequate time for her to learn parenting skills. Assuming that the ADA would have been applicable in this case,[3] this Court has held that if a respondent believes that her rights under the ADA are being violated, she should bring this to the court's attention in a timely manner, "either when a service plan is adopted or soon afterward." *In re Terry*, 240 Mich App. 14, 26, 610 NW2d 563 (2000). Where a respondent fails to do so, the issue is waived. *Id*. at 26 n 5.

Here, respondent's counsel commented that the ADA was applicable to this case, but during the pendency of the case respondent did not claim that petitioner was not making adequate accommodation to her alleged disabilities. Respondent's failure to timely assert a violation of the ADA constituted a waiver of the issue, and "her sole remedy is to commence a separate action for discrimination under the ADA." *In re Terry*, 240 Mich App at 26.

Moreover, respondent's claim is without merit. The court ordered DHS to assess respondent's level of functioning and cognitive capabilities in order to allow appropriate services to be provided due to her lower level of functioning. The court's findings of fact clearly detail the extensive steps taken by DHS and the court to determine the extent of respondent's cognitive limitations and the accommodations necessary to provide an appropriate level of services. DHS provided respondent with one-on-one parenting education and coaching, and further accommodated respondent's learning style by tailoring the parent-agency agreement to a third-grade reading level, by demonstrating skills and techniques, and by providing charts and other visual aids to assist respondent in learning as she is a visual learner. DHS never progressed to the point of providing additional services to address the other aspects of the parent-agency agreement because no progress was being made on the basic aspects of parenting skills. The record reveals that petitioner made reasonable efforts to reunify respondent with her children.

Lastly, respondent argues that termination of her parental rights was not in the child's best interests. A court must order termination of a parent's rights if the court finds by a preponderance of the evidence that termination is in the child's best interests. MCL 712A.19b(5); *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013). The court may consider

[3] Respondent and her parents contended throughout the proceedings that respondent had some type of learning disability and had IED's at school. However, neither respondent nor her parents produced any IED's or evidence documenting her learning disability. Respondent's own expert testified that respondent is not developmentally delayed, but is of low average intelligence and has a slower than average "processing speed."

a variety of factors in making the best interest determination, including the parent-child bond, the child's need for permanency and stability, and the relative advantages of a foster home over the parent's home. *In re Olive/Metts Minors*, 297 Mich App at 41-42. This Court reviews for clear error the trial court's determination regarding the child's best interests. MCR 3.977(K); *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012).

Respondent essentially argues that the trial court erred by failing to accept Dr. Friedberg's opinion that respondent and the child should reside with the maternal grandparents[4] or Janice Hodder, with the child being placed in a guardianship with the caregiver and respondent being provided with a mental health specialist in the home to address her needs and her parenting skills. Respondent acknowledges, however, that "he [Dr. Friedberg] could not say if she would be able to parent [the child] completely on her own. He was clear that . . . she would not be able to currently live alone while parenting [the child]."

During the termination hearing, respondent suggested a plan to have the child and respondent live with and be taken care of by respondent's parents. In the best interest findings, the court stated:

> [The child] will be two years old in August 2013. In this case, any bond that existed between Mother and child has been undoubtedly weakened by the removal of the child, initial suspension of parenting time, and limited contact afforded by weekly supervised visits. While the evidence demonstrate that such a bond could be repaired and rebuilt, the Court does not believe that fostering such a relationship is in the best interest of [the child] given Mother's substantial barriers to safe and effective parenting. A bond alone, or the ability to repair a bond, does not provide justification to maintain the relationship. A bond will not protect the child from dangerous parenting practices already suffered by the child, or make sure she received proper care.
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> Mother argued that in lieu of termination of her parental rights, the child should be returned to her under the supervision of her parents. Mother's expert testified that he supported a plan in which Mother and the child would live with the maternal grandparents, in order for the grandparents to assure the safety of the child, while Mother could be afforded extensive services designed to improve her parenting. The Court finds Mother's proposed plan dubious for numerous reasons.
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> First, the plan is suspect because it is quite formless and appears to have been hatched at the eleventh hour. While placement with relatives may weigh against termination, a trial court is not required to leave a child with relatives in lieu of terminating an unfit parent's rights. *In re Mason*, 486 Mich at 164; *In re IEM*,

[4] The child was not residing with a relative when the termination hearing occurred but, rather, in foster care. Thus, this is not a case where the child's placement with a relative would weigh against termination. Cf. *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010).

233 Mich App 438, 453 (1999), overruled on other grounds 491 Mich 81 (2012). This Court is also not required to leave a child with any relative who is *merely present,* in particular when the relative has demonstrated he or she is inappropriate to care for the child. The testimony of Dr. Penny Baumaier leaves this Court fully convinced that the maternal grandmother is an entirely inappropriate caregiver for [the child]. Dr. Baumaier testified that on two occasions the grandmother "declined" to bring the child in for recommended medical treatment, for immunizations as well as follow up for poor weight gain and developmental delays. Most disconcerting to this Court is the prolonged amount of time between when Dr. Baumaier instructed Mother and the grandmother to take the child to an emergency room and the time the child actually arrived for emergency medical treatment. The fact that the doctor testified she was so concerned she was ready to call the police is appalling. This child unnecessarily suffered for a period of hours without having received the emergency medical care ordered by the treating pediatrician.

The grandparents' testimony attempted to persuade the Court that Mother was completely independent and managed her own affairs entirely. Mother's expert testi[mony] was vague about the terms of custody, where Mother and the child would live with the grandparents and Mother would receive weekly visits from an infant mental health specialist. Furthermore, Dr. Faller testified that the grandparents, during her assessment, wanted contact with [the child] but did not present any specific "plan" to protect the child, other tha[n] "lots of contact in the future," for the child not to be out of the mother, and to research child care. The grandparents' intention at the time Dr. Faller was involved was for Mother to take responsibility of the child. It is concerning that the grandparents' plan of maintaining a heightened degree of contact with the child in the future was the same as they had claimed prior to removal, multiple visits per week to observe the child. Even with the grandparents involved and purportedly checking in on this child, the child suffered horrible injuries and neglect. The grandparents testified that they had each multiple visits to the child's home per week to observe and never noted any concerns. The facts established that Father punched holes in the walls of the home, which neither grandparent had ever observed. The facts establish that there were numerous people in the home using drugs, which neither grandparent ever discerned. The facts establish that the child was not being fed properly, with propped bottles and insufficient weight gain, which neither grandparent ever detected. It was Dr. Faller's opinion, given the treatment the child endured, that the maternal grandparents were either unobservant or uninvolved. Most concerning, Mother testified on the last day of trial she planned to live alone with the child but would appreciate "guidance" from her parents.

> Second, without a legal guardianship to keep the child under the physical control of a safe and appropriate caregiver, who would protect the child from Mother, there would be nothing to prevent Mother from removing the child from this protector and returning her to an environment similar to that through which she had already suffered. The ADA does not require the department to provide a parent with full-time, live-in assistance to provide for proper care and custody. *Terry*, 240 Mich App at 27-28.
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> Third, a court must consider the stability and permanence for the children when deciding to terminate parental rights, rather than continue temporary wardship to allow the children to be placed with relatives so the parent is afforded additional time to complete services over a lengthy period of time. *McIntyre*, 192 Mich App at 52-53; Given Mother's limitations, coupled with the horrific abuse [the child] suffered as a result of her inability or failure to protect her, it is not in this young child's best interests to spend years in foster or relative care to see when, *or even if*, her mother can be rehabilitated. [The child] should not have to wait indefinitely, in or out of her Mother's care, for parental reformation and rehabilitation which may never come to fruition. *In re Dahms*, 187 Mich App 644, 647 (1991). [The child] needs stability and permanency, which is something this mother cannot provide in the reasonably near future, or potentially at all. *In re VanDalen*, 293 Mich App 120, 141 (2011).
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> It is in the child's best interest to be raised by someone who can provide her with a stable and safe home. If a parent cannot carry out minimal parental responsibilities, the needs of the child must prevail over the needs of the parent, irrespective of the parent's good intentions. *Terry*, 240 Mich App at 28. Dr. Faller testified that the dramatic improvements the child had made in her affect and development was indicative that her delays were environmental and not something innate. [The child] has received services through Early On including physical therapy, occupational therapy, and speech therapy both in the foster home and at day care. Ms. Miller reported that the child was thriving in foster care. The foster parents are willing and able to adopt the child. The child has made substantial progress while in foster care and there is a significant risk she would regress and face future neglect if returned to Mother's custody. The Court finds by clear and convincing evidence that is in the best interests of the [child] to terminate parental rights. MCL 712A.19b(5).

Despite these detailed findings by the court that are supported by the record, respondent argues that "the record was replete of clear and convincing evidence that it was in the best interest of the children [sic: child] to terminate his [sic: her] parental rights." The only witness who mentioned a guardianship with the maternal grandparents in lieu of termination was Dr. Friedberg, yet Dr. Friedberg could offer no timeline with regard to how long it would take respondent to learn the basic parenting skills necessary to care for the child and keep the child safe. It was not error for the trial court to find that it was in the child's best interest to terminate respondent's parental rights. See *In re Frey*, 297 Mich App 242, 258-249; 824 NW2d 569 (2012) (finding that a trial court did not clearly err in holding that it was in the child's best

interests to terminate a mother and father's parental rights because neither could provide a permanent, safe, stable home in the near future).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ William C. Whitbeck